No. 84-38

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1984

PEOPLE OF THE STATE OF ILLINOIS,
and
PEOPLE OF THE STATE OF MICHIGAN,

Petitioners,

vs.

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE and THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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August, 1984

QUESTION PRESENTED

Should this Court grant certiorari to once again state the rule that it is federal law, not state law, that governs this dispute between Illinois, Michigan, and three municipal corporations of Wisconsin concerning use of Lake Michigan waters?

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STATEMENT OF THE CASE

This 14 year old *interstate* water pollution case (involving both the interstate waters of Lake Michigan and the competing and conflicting interests of three sovereign states in the waters and its uses) has twice been presented to this Court. On each occasion, this Court has held that *federal law* governs this case, recognizing that the constitutional interests of federalism make application of state law inappropriate. Upon remand from this Court's most recent decision, the Court of Appeals for the Seventh Circuit followed suit: "This is a controversy of federal dimension, implicating the conflicting rights of states and inappropriate for state law resolution." App. at A-16.

After all of this, and after petitioners have refused to avail themselves of the remedies provided by the applicable federal law, petitioners once again ask this Court to apply state law in this case. Respondents are reminded, as was the Wisconsin Supreme Court

in somewhat analogous circumstances, of the response made by General Bedford Forrest to an unreasonably repeated request by one of his soldiers:

> "We call to mind the statement of Gen. Nathan Bedford Forrest, that semi-literate cavalry genius of the Confederate States of America, who, after twice refusing a private's request for furlough, scribbled on the back of the form, 'I told you twicest Godamnit know.' Andrew Lytle, Bedford Forrest and His Critter Company (rev. ed. 1960), p. 372." *Bischoff v. First Wisconsin Trust Co.*, 30 Wis.2d 583, 591, 141 N.W.2d 188 (1966).

I. HISTORY OF PRIOR PROCEEDINGS.

This case involves the conflicting interests of petitioners, the States of Illinois and Michigan, and defendant-respondents, which are municipal bodies of the State of Wisconsin (collectively, "Milwaukee"), in the use of the waters of Lake Michigan. As the Seventh Circuit held on remand:

> "In the present cases the political subdivisions of one state claim a right to an extent of use of interstate water in the exercise of their public health function. A different state complains that a use to that extent causes contamination of its waters and is inimical to public health because those waters are used for water supplies and recreation." App. at A-16.

Milwaukee operates a sewerage system and discharges effluent to Lake Michigan. It does so under authority of discharge permits issued pursuant to the 1972 amendments to the Federal Water Pollution Control Act ("FWPCA"). Milwaukee's discharge permits, together with a 1977 Wisconsin Circuit Court judgment enforcing the permits, require Milwaukee to meet certain effluent limitations and establish criteria for the completion of planning and additional

construction to control sewage overflows. As a result of the 1977 state court judgment, Milwaukee is well under way on a comprehensive $1.53 billion sewer cleanup program.

In this case, Illinois has sought to impose upon Milwaukee (and the District Court did impose) effluent limitations and overflow abatement requirements considerably more onerous than those imposed by Milwaukee's federally mandated discharge permits and the Wisconsin enforcement judgment. In 1979 the Court of Appeals upheld the District Court's overflow abatement requirements and reversed the more onerous effluent limitations. 599 F.2d 1151. It did so on the basis of federal common law, holding state law not to be applicable, expressly following the rationale of *Milwaukee I*.

On March 17, 1980, this Court granted Milwaukee's petition for certiorari herein. 445 U.S. 926. A stay of the judgments below pending review on certiorari was granted by Justice Stevens on May 8, 1980. Since that time work on Milwaukee's sewerage system has gone forward to comply with the permit requirements and the Wisconsin enforcement order.

This Court decided the merits of Milwaukee's certiorari petition in *Milwaukee v. Illinois ("Milwaukee II")*, 451 U.S. 304 (1981). It vacated the Court of Appeals' decision, holding that the federal common law of water pollution nuisance upon which the Court of Appeals had relied had been displaced by FWPCA's complete and pervasive federal statutory scheme of water pollution control. This Court noted the inconsistency of Illinois' and the trial court's position that both federal and state law applied to the case, saying: "If state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law cannot be used." 451 U.S. at 313 n.7. This Court also specifically reaffirmed its prior overruling of the position in *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971) that state law controlled interstate water pollution disputes. 451 U.S. at 327 n.19. (Illinois had relied upon *Wyandotte* in arguing before the District Court, the Court of Appeals and this Court that state law was applicable, and had specifically attempted to raise again the question of state law applicability by certiorari. After issuing its decision herein this Court denied Illinois' certiorari petition regarding its state law claims, *Illinois v. Milwaukee*, 451 U.S. 982 (1981)).

This Court's decision in *Milwaukee II* on the merits of Milwaukee's certiorari petition, coupled with the denial of Illinois'

certiorari petition seeking to validate the Illinois state law claims, constituted a complete adjudication of this case in the favor of Milwaukee.

II. THE NATURE OF THE PETITION.

By this petition, Illinois and Michican ask the Court to: (1) reverse this Court's former denial of Illinois' certiorari petition directed to the same subject; (2) overlook this Court's twice-repeated overruling of *Ohio v. Wyandotte Chemicals Corp., supra*, most recently in direct response to Illinois' arguments in this case; (3) overrule this Court's holding in *Milwaukee I* that federal law governs interstate water pollution disputes because of the overriding federal interest in the need for a uniform rule of decision and the basic interests of federalism, principles reiterated by this Court as recently as May 26, 1981 in *Texas Industries, Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630 (1981); and (4) reverse the Court of Appeals' holding on remand in this case as well as its holding in *City of Evansville, Indiana v. Kentucky Liquid Recycling*, 604 F.2d 1008 (7th Cir. 1979), cert. denied 444 U.S. 1025 (1980) that state law is inapplicable to interstate water pollution disputes implicating the competing interests of two or more states.

REASONS FOR DENYING THE WRIT

The federal law of interstate water disputes was initially developed in a series of state vs. state original jurisdiction cases over the use or pollution of interstate waters. *See*, e.g., *Kansas v. Colorado*, 206 U.S. 46 (1907); *Missouri v. Illinois*, 200 U.S. 496 (1906). *Hinderlider v. LaPlata River & Cherry Creek D. Co.*, 304 U.S. 92 (1938) (decided the same day as *Erie R. Co. v. Thompson*, 304 U.S. 64). These cases made it clear that federal law was applicable even in nonstate versus state water disputes, so long as the conflicting interests of two or more states were implicated.

In *Ohio v. Wyandotte* this Court momentarily seemed to abandon the federal law of interstate waters. See 401 U.S. at 498 n.3. However, in *Milwaukee I* a unanimous Court made clear that federal law controls, holding that it is both the character of the

parties and the subject matter of interstate water pollution disputes implicating the interests of several states that requires the application of federal rather than state law. The Court expressly overruled *Wyandotte*.

The decision in *Milwaukee I* states, repeatedly, that federal law, not state law, must be applied to interstate water disputes:

> "Our decisions concerning interstate waters contain the same theme. Rights in interstate streams, like questions of boundaries, 'have been recognized as presenting federal questions.' *Hinderlider v. La Plata Co.* 304 U.S. 92, 110. The question of apportionment of interstate waters is a question of 'federal common law' upon which state statutes or decisions are not conclusive." 406 U.S. at 105.

> "Thus, it is not only the character of the parties that requires us to apply federal law. See *Georgia v. Tennssee Copper Co.*, 206 U.S. 230, 237; cf. *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 289; The Federalist No. 80 (A. Hamilton). As Mr. Justice Harlan indicated for the Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421-427, where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law. See also *Clearfield Trust Co. v. United States*, 318 U.S. 363; *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447; C. Wright, The Law of Federal Courts 249 (2d ed. 1970) Woods & Reed, *supra*, n. 5 [12 Ariz. L. Rev. 691] at 703-713; Note, 50 Texas L. Rev. 183. Certainly these same demands for applying federal law are present in the pollution of a body of water such as Lake Michigan bounded, as it is, by four States." 406 U.S. at 105 n. 6.

> "Those who maintain that state law governs overlook the fact that the *Hinderlider* case was

> written by Mr. Justice Brandeis who also wrote for the Court in *Erie R. Co. v. Thompson*, 304 U.S. 64, the two cases being decided the same day." 406 U.S. at 105 n. 7.

It was in this context that the Court overruled *Wyandotte*. 406 U.S. at 102 n. 3. State law mistakenly thought to be applicable in *Wyandotte* was held inapplicable by a unanimous Court.

The basic teaching of *Milwaukee I* for present purposes is that "it is not only the character of the parties that *requires us to apply federal law*" (emphasis supplied), but also the fact that "the controversy touches basic interests of federalism." 406 U.S. at 105 n. 6.

In *Milwaukee II* this Court once again acknowledged that *federal* law must be applied:

> "The Court reasoned [in *Milwaukee I*] that federal law applied to the dispute, one between a sovereign State and political subdivisions of another State concerning pollution of interstate waters, but that the various laws which Congress had enacted 'touching interstate waters' were 'not necessarily the only federal remedies available.' " 451 U.S. at 309, citing 406 U.S. at 101, 103.

More importantly, after Illinois fully and forcefully presented its state law arguments in its brief and at oral argument, this Court made these direct responses in *Milwaukee II*:

> "When Congress has not spoken to a particular issue, however, and when there exists a 'significant conflict between some federal policy or interest and the use of state law,' [citation deleted],[7] the Court has found it necessary, in a 'few and restricted' instances, [citation deleted], to develop federal common law." 451 U.S. at 313.
>
> [7]"In this regard we note the inconsistency in Illinois' argument and the decision of the District Court that both federal

> and state nuisance law apply to this case. *If state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law cannot be used.*" (Emphasis supplied.) 451 U.S. at 313, n. 7.

> "[T]his Court's decision in *Ohio v. Wyandotte Chemicals Corp.* . . .indicated that *state* common law would control a claim such as Illinois'. . . .The Court in *Illinois v. Milwaukee* found it necessary to overrule this statement, see 406 U.S. at 102, n. 3. . . ." 451 U.S. at 327 n. 19.

The significance of the foregoing quotations from *Milwaukee II* is obvious. This Court recognized the federal common law remedy in *Milwaukee I* "because" state law could not be applied to this type of dispute, and overruled the oniy contrary indication. The fact that FWPCA has now displaced the federal common law does not change this cause-and-effect relationship. *The existence of federal common law did not cause state law to be inapplicable. Rather, because state law could not be used, federal common law was applied in the absence of a complete and comprehensive federal statutory law.* Illinois and Michigan have misread the cause and effect. Their quarrel is directed at this Court's holding that state law is not applicable to interstate water controversies implicating the interests of several states. This Court directly responded to Illinois' state law argument in *Milwaukee II.* The Court's subsequent denial of Illinois' certiorari petition was the *coup de grace.*

The footnote indications in the Court of Appeals' March 27, 1984 decision that a state may impose its own laws and regulations on its own citizens, and that the Court of Appeals' decision does not preclude an out-of-state party from seeking to enforce such laws and regulations in the courts of that state, have no applicability to this action. They are pure dicta, as the Court of Appeals specifically recognized.

In contrast, Illinois' and Michigan's state law arguments on the facts of this case were clearly before this Court in *Milwaukee II.* At oral argument, for example, the following exchange occurred between Mr. Justice White and counsel for the State of Illinois:

MR. KARAGANIS: In that case [*Milwaukee I*], that case did not say. It said that in the interpretation, as we interpret the *Illinois v. Milwaukee decision, it says that in the interpretation of the federal common law, federal law must govern the interpretation of that federal common law. We have no dispute with that question.*

QUESTION: *Well, the case expressly said that the application of federal law was required in this kind of case.*

MR. KARAGANIS: Well, Your Honor —

QUESTION: Didn't it or not —

MR. KARAGANIS: *We don't believe it did, Your Honor.*

QUESTION: *If I can find it, could I read it to you?* Is it —

MR. KARAGANIS: *Yes.*

QUESTION: *Well, Footnote 6 said, "Thus we are required to apply federal law in this case."*

MR. KARAGANIS: *With all due respect to the Court, Footnote 6 is based on the Lincoln Mills decision,* and we've gone back to the Lincoln Mills decision and what Lincoln Mills says is that, as Deitrick v. Greaney and D'Oench, Duhme, and a variety of other cases —

QUESTION: *Well, you may think it was based on Lincoln Mills, but the text of it came out of interstate waters."* (Emphasis supplied) Transcript of December 2, 1980 oral argument before U.S. Supreme Court at 28-29.

When the Court decided the merits of Milwaukee's petition in *Milwaukee II*, it referred to this fundamental distinction:

> "Section 510 [33 U.S.C. §1370] provides that nothing in the Act shall preclude States from adopting and enforcing limitations on the discharge of pollutants more stringent than those adopted under the Act. It is one thing, however, to say that *States may adopt more stringent limitations through state administrative processes, or even that States may establish such limitations through state nuisance law, and apply them to in-state dischargers.* It is quite another to say that States may call upon *federal* courts to employ *federal* common law to establish more stringent standards applicable to out-of-state dischargers." (Emphasis supplied in part.) 451 U.S. at 327-328.

Rationally construed, FWPCA contemplates the application of a state's own laws to discharges made within its own geographical boundaries, so long as the minimal federal restrictions are not undercut, but not to out-of-state discharges. This is the only construction which, because of the interests of federalism, will avoid a serious constitutional question.

Congress was not oblivious to the possibility that a number of states might be affected by the pollution of interstate waters by an out-of-state discharger. For a number of different states to have regulatory authority over a single discharge would lead to chaotic confrontations between sovereign states. Accordingly, 33 U.S.C. §1342(b) authorizes a state to administer a permit program "for discharges into navigable waters within its jurisdiction." It does not authorize a state to apply its laws extraterritorially.

Each state's interest in the terms of permits granted by other states, as well as the permittee's interest in being able to rely upon the terms of the permit, are protected by a detailed set of administrative procedures relating to the issuance of permits.

As discussed by this Court in *Milwaukee II*, a state permit-granting agency is required by 33 U.S.C. §1342(b)(3) to ensure that any state whose waters may be affected by the issuance of a per-

mit receives notice of the application and is given opportunity to participate in a public hearing. 33 U.S.C. §1342 (b)(5) provides that state permit-granting agencies must ensure that affected states have an opportunity to submit written recommendations, and both the affected state and the EPA must receive notice and a statement of reasons why any part of such recommendations are rejected. Under 33 U.S.C. §1342(d)(2)(A), the EPA may veto any permit issued by a state when waters of another state may be affected. Under 33 U.S.C. §1342(d)(4), added in 1977, the EPA itself may issue permits if a stalemate between an issuing state and objecting state develops. Illinois took advantage of none of these procedures in this case.

Giving extraterritorial effect to state law in interstate water pollution disputes will destroy the balanced structure of FWPCA. Although FWPCA contains various provisions relating to state authority in the field of water pollution, none of these provisions expressly or by fair implication gives the states power outside of FWPCA to apply any of their laws extraterritorially. When a state adopts more stringent requirements than those federally mandated, they are incorporated under the Act in the permits which are required for *all* point sources. Enforcement then is under the provisions of FWPCA and all persons, including neighboring states, are accorded federal rights to such enforcement in respect of *interstate* waters. As *Milwaukee II* makes clear, the savings provisions in 33 U.S.C. §§1365(e) and 1370 (Sections 505(e) and 510 of FWPCA, respectively) should be construed in light of the statute as a whole and particularly in light of 33 U.S.C. §1342 which gives states regulatory authority over discharges within their own geographical jurisdiction. The statutory system overall gives ample scope and a sensible meaning which adequately protects affected states. This Court has not taken and should not take a contrary position.

This Court has already determined that no federal cause of action exists in the circumstances presented. This Court has also determined that federal law is exclusive in respect of the use of interstate waters affecting the competing interests of two or more states. All that is left in this action is the assertion that state law might provide a basis for consideration in another court. The petition should be denied since (as the Court of Appeals recognized) dismissal is the only procedure applicable in these premises.

CONCLUSION

Illinois and Michigan would have this Court rule that its actions in *Milwaukee I* and *Milwaukee II* were an exercise in futility; that state law somehow controlled the rights of these parties in this interstate water dispute before *Milwaukee I;* that the federal common law recognized in *Milwaukee I* caused state law to be inoperative until *Milwaukee II;* and that *Milwaukee II* caused state law to become operative again — all of this nullifying three Supreme Court decisions in this dispute (including the denial of Illinois' first petition for certiorari on the precise issue before this Court *in this* case, as well as the express overruling of *Wyandotte*, the only decision that could support Illinois' position) and their progeny. This is hardly a position that the Court should accept. This Court has spoken on the precise issue presented by this petition. The petition should be denied.

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